IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 36

EARL H. McDONALD, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

No.

JOSEPH F. WASHINGTON, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

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PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

Petitioners, Earl H. McDonald and Joseph F. Washington, respectfully pray for writs of certiorari to review the decision and judgments of the United States Court of Appeals for the District of Columbia, entered on February 16, 1948, affirming the judgments of the District Court of the United States for the District of Columbia.

The Opinions Below.

The District Court filed no opinion when it denied the motion to suppress, adjudged the petitioners guilty, and imposed sentence. The earlier memorandum opinion of the District Court on the motion to suppress (R. 6-7) is unreported. The majority and minority opinions of the Court of Appeals (R. 28-31) have not yet been reported.

Jurisdiction.

The judgment of the Court of Appeals was entered on February 16, 1948. (R. 32) The jurisdiction of this Court is invoked under Rule 37b(2) of the Rules of Criminal Procedure.

Questions Presented.

Whether the action of police officers, after having applied to the United States Commissioner for a warrant and having been refused, in breaking into a private dwelling by climbing through a window without permission, proceeding on a general exploratory search of the premises without a warrant of any kind, and climbing on a chair in the second floor corridor to peer over a transom into a tenant's locked room constitutes an unreasonable search and seizure. Whether a roomer as well as a landlord has constitutional rights under these circumstances protected by the 4th and 5th Amendments.

Statement of the Case.

This case presents for correction errors of the District Court of the United States for the District of Columbia, erroneously affirmed by the United States Court of Appeals for the District of Columbia.

About 3:30 P.M. on June 22, 1946, police officers Ogle, Blick and Clarke went to premises 1608 3rd St., N.W., Washington, D. C., a brick residence in a row of houses containing a basement, first floor and second floor. This residence was owned by Mrs. Barbara Terry, who occupied

part of the first floor and rented rooms. At the time of this occurrence Mrs. Terry had several tenants, one of whom was the petitioner McDonald who rented a room on the second floor. (R. 11; 13)

The police officers were not responding to an emergency call and did not have a warrant of any kind for anyone in the premises. They had neither a search warrant for the premises nor a warrant of arrest for either of the appellants. (R. 18) The police officers had applied to the United States Commissioner on several occasions but had never obtained a warrant. (R. 24)

The door to the residence is usually locked and was locked on June 22, 1946. Without the permission of Mrs. Terry, Detective Sgt. Ogle raised the window leading into her bedroom and climbed in through the window. (R. 17) Mrs. Terry screamed and Sgt. Ogle brushed her aside. He went to the front door, unlocked it and admitted Lt. Blick. Sgt. Ogle then went to the back door, unlocked the screen door and admitted Detective Sgt. Clarke. (R. 12)

The police officers then searched the rooms on the first floor and went up to the second floor. They searched the bedrooms and closets on the second floor. Noticing the rear room on the second floor was locked, Sgt. Ogle took a chair from the middle bedroom and looked over the transom. (R. 13) He then directed the occupant to open the door and petitioner McDonald complied with his instructions. Petitioners McDonald and Washington who were in the room were placed under arrest and certain property was seized by the officers. (R. 14) Mrs. Terry objected to the method in which the police officers entered her house without permission and without ringing the bell. (R. 15)

Petitioners were indicted September 6, 1946 on four counts involving one transaction for promoting a lottery, possessing lottery tickets and keeping a place and a table for wagering on horse races. (R. 3-4) A motion for the return of seized property and the suppression of evidence was filed on September 11, 1946 and denied by District Court on October 16, 1946. (R. 6-8)

On November 13, 1946, when the case came on for hearing, petitioners waived trial by jury and elected to be tried by the court. The motion for the return of seized property and the suppression of evidence was re-argued. On January 20, 1947 the District Court denied the motion and found the petitioners guilty on all four counts. (R. 10) On March 28, 1947 petitioner McDonald was sentenced to imprisonment for a period of six months to eighteen months and petitioner Washington was sentenced to imprisonment for a term of sixty days, after which an appeal was instituted. (R. 10-11)

Specification of Errors to be Urged.

The two justices of the Court of Appeals, forming the majority in the present case, erred in holding that the constitutional rights of petitioners were not violated by the actions of the police officers in this case and in affirming the judgments of the District Court.

Reasons for Granting the Writ.

1. The majority decision of the Court of Appeals has not given proper effect to and conflicts with the applicable decisions of this Court. It is considered unnecessary to cite the long list of leading cases on this subject.

Police officers in the instant case broke into a private dwelling without a search warrant and without a warrant of arrest for anyone. The record shows that the officers had applied to the United States Commissioner on several occasions but had failed to secure a warrant of any kind. (R. 24) In *Johnson* v. *United States*, 92 L. ed. 323, 325, decided February 2, 1948, this Court said:

> "Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. Crime, even

> in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent."

Having failed to obtain a warrant from the properly constituted authorities, the police officers in the present case took matters into their own hands and proceeded to make the search without such warrant. It is submitted that the majority opinion of the Court of Appeals is in conflict with the decisions of this Court and invites serious abuses of individual rights by the police.

2. The majority opinion of the Court of Appeals is in conflict with decisions of other Circuit Courts of Appeal on the same matter. In treating a similar situation, the 3rd Circuit Court of Appeals said in *Brown, et al.* v. *United States*, 83 F. (2d) 383:

> "The house was a private dwelling in which the proprietress with her family lived. She also kept roomers. It was not a hotel, restaurant, or public place where the public was invited or had the right to come and go at will. Into this home the officers of the government practically forced themselves without the semblance of authority, for they did not see any crime being committed and did not even have probable cause sufficient to justify the issuance of a search warrant, or probable cause to believe that Lillian Brown had committed a felony. The existence of probable cause does not justify the search of a private dwelling without a search warrant. *Gouled* v. *United States*, 255 U. S. 298, 41 S. Ct. 261, 65 L. Ed. 647; Agnello v. U. S., 269 U. S. 20, 32, 33, 46 S. Ct. 4, 70 L. Ed. 145, 51 A. L. R. 409; United States v. Lefkowitz, 285 U. S. 452, 52 S. Ct. 420, 76 L. Ed. 877, 82 A. L. R. 775. . . .

> "Carinelli and Neubert were roomers in the house. It was their home and so far as the unlawful search affected them, it violated their constitutional rights.
>
> "The entrance into the house was unlawful and the officers were trespassers. As such, they had no right to make an exploratory search of every room in the house from cellar to attic, ransacking every closet, dresser drawer, or piece of clothing, obtaining the key to some of the doors of the garage by threats and breaking down others. Any evidence obtained during and by means of such search may not be used against the defendants."

Compare also *Waxman* v. *United States*, 12 F. (2d) 775 (C. C. A. 9th), cert. denied, 273 U. S. 716; *Coon* v. *United States*, 36 F. (2d) 164 (C. C. A. 10th).

The dissenting opinion of the Court of Appeals in the present case reads in part as follows (R. 31):

> "A roomer's constitutional right of privacy is a fiction that keeps the word of promise to the ear and breaks it to the hope unless it includes a right not to be spied upon by trespassers who force their way into his corridor. Yet the government contends that search by such trespassers is reasonable and the court decides that it is not a search. Neither of these propositions is comprehensible to me. No doubt a roomer's interest in a corridor is different from a householder's. Probably the one may be called an easement and the other an estate, as the government suggests. But I know of no reason why this difference should be critical here. To hold that McDonald cannot complain because he is only a roomer perverts the letter as well as the spirit of the constitutional guaranty against unreasonable searches and creates a discrimination in civil rights that is out of place in a democratic society."

It is submitted that this minority opinion is in accord with the decisions of this Court and the various Circuit Courts of Appeal and that the ruling of the two Justices of the Court of Appeals, forming the majority, should be reviewed by this Court.

Conclusion.

WHEREFORE, it is respectfully submitted that this petition for writs of certiorari should be granted.

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